

REPORT ON MATTERS OF CONCERN

INTRODUCTION

1. The members of the Amatola Water Board take this opportunity to assure the Honourable Minister of their commitment to good governance and to act in the best interest of Amatola Water at all times.
2. Matters that are of concern to the Minister affecting Amatola Water are not taken lightly, and the Board endeavours to resolve them in the interests of the organisation and the Ministry
3. The members of Amatola Water Board have now become aware of the following matters of concern raised by the Honourable Minister and communicated to the AW Board in through the Interim Chairperson.
 - 3.1. Authority to implement the Task Team Report,
 - 3.2. A "petition" to the Minister by AW Board members relating to the Ministers decision to re - instate a dismissed employee
 - 3.3. The AW Board not concerned with the big issues in the sector and the province,
 - 3.4. invitations by the Minister are not honoured.
 - 3.5. The low attendance by Board members at the meeting of the 23 October 2019, and
 - 3.6. The Board recommending an Interim Board Representative to co - ordinate Board matters pursuant to the resignation of the incumbent Chairperson whilst we await the appointment of a Chairperson by the Ministry.
 - 3.7. irregular Expenditure incurred in prior years in respect of WPA
(Item 3.2 to 3.7 are discussed under OTHER MATTERS hereunder.
4. The purpose of this submission therefore, is to provide the Minister with a comprehensive report on matters of her concerns and to provide additional information related to the resultant termination of Mr Totolo's services.
5. The report is supported by Annexures which can be availed to the Minister if required.

TASK TEAM REPORT IMPLEMENTATION

6. During October 2016, the former Minister, Nomvula Mokonyane, instituted an investigation into numerous allegations of maladministration at Amatola Water, as envisaged in section 45 of the Water Services Act. This was primarily in response to various complaints by the South African Municipal Workers Union and in order to resolve a strike action that threatened water supply. The Task Team constituted by the former Minister, after holding numerous interviews with a wide range of stakeholders, including

senior managers of Amatola Water, representatives of the Union, officials of the Department, representatives of municipalities, and members of the board, produced a comprehensive report addressing the various allegations and making recommendations to the Minister. The Minister accepted the recommendations and in turn instructed the board to implement them. Thereafter, regular reports were submitted to the Minister to update her on progress with the implementation of the recommendations. Copies of the report of the task team and the Minister's instruction are attached, marked "A".

7. The Task Team recommended, *inter alia*, that Mr Makibinyane (the former Chief Executive), Mrs N Ku (the former Human Resources Manager) and Mr Totolo, the former full-time shop steward, be disciplined in respect of the allegation that they had backdated the agreement in terms of which Mr Totolo had been appointed as full-time shop steward. The relevant recommendations in this regard can be found at sub-paragraphs 8.2 (m) and (n) of the Task Team report. The Task Team was of the opinion that this conduct was fraudulent. The Task Team further found that all the allegations of fraud and mal-administration levelled at the board were baseless.

8. It is necessary to also point out that an investigation conducted by an independent audit firm, PricewaterhouseCoopers, at the request of the board, after receipt of a whistleblower's complaint, also concluded that the agreement had been improperly backdated. A copy of that report, without annexures so as to avoid prolixity, is attached marked "B", and the Minister's attention is directed to sub-paragraphs 4.69 to 4.97. In the light of the Task Team's recommendations and the Minister's instruction to implement the recommendations, the board took a resolution that the recommendations be implemented.

9. Mr Totolo was subsequently suspended and charged with misconduct in a disciplinary enquiry instituted under the direction of the previous Acting Chief Executive. It later came to the attention of the board and management, following receipt of a further whistleblower's complaint, that Mr Totolo had not disclosed a previous criminal record to Amatola Water at the time of his employment. Since this was obviously a serious offence, the allegations were investigated by both a private investigator as well as PricewaterhouseCoopers which investigations uncovered that Mr Totolo was sentenced to 8 years for armed robbery. The reports and other documents relevant to these allegations, as used in subsequent disciplinary proceedings and arbitration proceedings, are attached, marked "C".

10. Following the further investigations additional charges were brought against Mr Totolo on the authority of the then Acting Chief Executive. This was of course entirely appropriate given that the discipline of staff at Mr Totolo's level was an operational matter falling within delegated functions of the Chief Executive. The full charges are attached, marked "D".

11. Mr Totolo was found guilty in the disciplinary enquiry of all the allegations of gross dishonesty and material breach of his duty of good faith to Amatola Water, brought against him and was dismissed by the then acting Chief Executive. The enquiry was chaired by a practising advocate, Adv. Sakhele Poswa. Copies of Adv. Poswa's findings on guilt and sanction are attached, marked "E". As can be seen from the report, Adv. Poswa's findings are carefully reasoned.

12. Mr Totolo lodged an internal appeal. That appeal was heard by a practising attorney and labour law specialist, Mrs Ntshiki Pakade. She dismissed the appeal. A copy of her findings is attached, marked "F". It will again be noted that Ms Pakade arrived at carefully reasoned conclusions.

13. Mr Totolo referred a dispute to the CCMA. In the course of those proceedings Amatola Water was represented by its Executive Manager: Corporate Services who reported to the Chief Executive. The Chief Executive of Amatola Water, Mrs Zitumane, vigorously opposed Mr Totolo's claim, obviously after having satisfied herself that the claim had no merit. That view was entirely appropriate and justified in the circumstances. Indeed, it was subsequently vindicated by the CCMA Commissioner who issued an award in which he upheld Mr Totolo's dismissal. A copy of the arbitration award is attached, marked "G". The award is considered reasonable in respect of its conclusions relative to Mr Totolo's dismissal and the reasons for those conclusions.
14. Still not content, Mr Totolo instituted proceedings in the Labour Court in March 2019 to review and set aside the Commissioner's findings. Amatola Water justifiably opposed the review proceedings. Indeed, it brought a counter review application in respect of the finding of the Commissioner that Mr Totolo was not guilty of the backdating charge. The Chief Executive deposed to an affidavit in this regard, a copy of which is attached, marked "H". In that affidavit, after setting out the evidence and the inferences to be drawn from the evidence, Mrs Zitumane submitted to the court that Mr Totolo "was therefore, clearly guilty of gross dishonesty" in respect of the backdating charge and that the commissioner's findings to the contrary are unreasonable and fall to be reviewed and set aside. The Executive Manager: Corporate Services deposed to a confirmatory affidavit. The conduct of the organisation's management was again appropriate and beyond reproach.
15. On a public interest level, it is significant that Mr Totolo was found guilty of gross misconduct which was destructive of the employment relationship. That the misconduct involved the dishonest concealment of a criminal record relating to the commission of a violent crime (armed robbery) for which Mr Totolo was sentenced to eight years imprisonment, is not insignificant considering that the State as a matter of course dismisses for such misconduct.
16. We understand that the Minister's decision was prompted mainly by her concern to avert a threatened strike. The Minister, after taking the decision that Mr Totolo must be reinstated, also indicated that it is her intention to further investigate the matter.
17. Relating to the governance concerns that the Minister expressed about the handling of the Totolo matter, we would wish the Minister to take into account are the :
- (a) Firstly, the governance of Amatola Water resides with its board. The board is authorised to exercise all the powers, perform all the functions and carry out all the duties of a water board in terms of the Water Services Act. Section 31 provides that a water board is a body corporate and has all the powers of a natural person of full capacity except where such powers are inconsistent with the Act. Section 37 of the Act provides for a water board to delegate any operational power to its chief executive. This is precisely what the board has done in respect of disciplinary matters relative to employees at the level of Mr Totolo. The institution of disciplinary proceedings is a normal operational function at any state-owned entity, but during a significant part of the time, covered by the events, AW had an acting CE an acting EM: Corporate Services and an acting HR manager.
- (b) A CCMA Commissioner, after lengthy arbitration proceedings and after hearing much evidence, concluded that Mr Totolo's dismissal was fair both procedurally and substantively. The Commissioner's award is final and

binding in terms of the Labour Relations Act. Mr Totolo was of course entitled to challenge the Commissioner's award which he has done.

18. Given the above history, all of which is supported by the documentation attached hereto, we trust that the Minister is now better informed. Should the Minister require any further information in our possession which is of relevance to the decision, she must not hesitate to request such information.
19. Insofar as reliance has been placed by the Minister on a legal opinion obtained from Adv Luvuyo Bono, we point out the following:
- a) The main premise of Adv Bono's opinion is that Mr Totolo had been subjected to disciplinary action because of a protected disclosure he had made to the Minister that the former board chairperson (Ms Nokulunga Mngqeta) had been arrested by the Hawks, and that this was impermissible. Also of importance to Adv Bono's ultimate conclusion was a timeline of events and his view that the chairperson was "hands on" in Mr Totolo's case in order to "settle a score" with him for having provided the arrest information to the Minister.
 - b) Ms Mngqeta's arrest by the Hawks occurred on 23 May 2016 and was televised on ENCA and widely reported in the print media. Mr Totolo self-evidently informed the Minister of the arrest only after it had occurred. By that stage the information was already public. We attach a copy of the relevant article from the Daily Dispatch dated 24 May 2016 marked "H". Indeed Mr Totolo is reported by the Ministerial Task Team as stating that he had learned of the arrest and fraud allegations against Ms Mngqeta from an article published in the Daily Dispatch newspaper on 24 May 2016 (see paragraph 5.1 (e) at page 7 of the Task Team's report) It is therefore misplaced to suggest that Mr Totolo was a whistleblower.
 - c) Mr Totolo himself at no stage invoked the provisions of the Protected Disclosures Act-neither in the disciplinary proceedings, the internal appeal, and the CCMA proceedings nor in the pending review in the Labour Court. One can self-evidently not be a whistleblower if you don't assert that you are one and invoke the protection of the whistleblower legislation. It must therefore follow that the disciplinary action taken against Mr Totolo was clearly not a contravention of the Protected Disclosures Act, and that Adv Bono is manifestly wrong.
 - d) As stated above, of further importance to Adv Bono was a timeline of events. Here too, he has misstated the position. At the outset he claims that Mr Totolo wrote to the Minister on 27 February (sic) and that the Minister responded on 30 May 2016. In paragraph 10 of the opinion he states: "This seemed to have started everything that happened against Mr Totolo because soon after the response of the Minister to which the Board Chairperson was copied, the board chairperson received whistleblowing reports by email about allegations against Mr Totolo and immediately the Board Chairperson was hands on in the appointment of WPA, who in turn appointed a private investigator." As will be apparent from what he says later in his opinion it was important for Adv Bono to determine that there was a nexus between Mr Totolo's letter to the Minister and the disciplinary action against him.

20. The correct facts, which Adv Bono ignored, were the following:

- a) Firstly, as stated above Mr Totolo wrote to the Minister in May 2016. He obviously could not have done so in February 2016, as stated by Adv Bono, because Ms Mnqeta had not yet been arrested.
- b) Secondly, as stated above the initial allegations against Mr Totolo related to the backdating of the full-time shop steward agreement and the unlawful increase of his salary. Those allegations were investigated by PwC and the Ministerial Task Team during 2016. It was only in May 2017, following the finalisation of the various investigations, that Mr Totolo was charged in disciplinary proceedings. Importantly, those charges were brought by the acting Chief Executive at the time, Mr Kevin Govindsamy, and not by Ms Mnqeta. The former board chairperson was therefore not "hands on" in relation to the disciplinary proceedings as claimed. Those disciplinary proceedings were initiated because the Ministerial Task Team had recommended that this be done and the Minister had instructed that the recommendations must be implemented, as stated above. Adv Bono's opinion therefore again misstates the facts.
- c) Thirdly, the allegations relating to Mr Totolo's concealment of his criminal past only surfaced in approximately June 2017. Those allegations were initially investigated by a private investigator which had been procured by Amatola Water's management to investigate threats against the then acting Chief Executive. The investigator was not appointed by Wesley Pretorius & Associates and certainly not by the former board chairperson. After this preliminary investigation the matter was fully investigated by PwC. Importantly, the whistleblowers allegations were credible. It was confirmed during the investigation that Mr Totolo indeed had a criminal record for robbery and that he had concealed this information at the time of his appointment. The former board chairperson was again not "hands on". The disciplinary proceedings were brought by the acting Chief Executive after a proper investigation.
- d) There is therefore clearly no nexus between the disciplinary action against Mr Totolo and the letter he wrote to the Minister, whether in the timeline or the events themselves. There is also no evidence whatsoever of any improper involvement or ulterior motive by the former chairperson of the board.
- e) Finally, the chairperson did not appoint Wesley Pretorius & Associates. All decisions in this regard were taken by the board and the Acting Chief Executive.
- f) Importantly, Adv. Bono is ultimately also satisfied that the charges brought against Mr Totolo were valid. In other words, he agrees that Mr Totolo was correctly found guilty of charges of gross dishonesty and a breach of his duty of good faith. It is well known, even to laypersons, that gross dishonesty and a breach of duty of good faith are the type of misconduct which irretrievably destroys the employment relationship. The courts have repeatedly upheld dismissals based on such misconduct. The CCMA further found that there was no procedural unfairness and Mr Totolo was not entitled to any redress.

he re - instatement decision may have far-reaching consequences. It may mean that Mr Totolo has to be paid a significant amount as backpay. This and the expenditure

relative to the disciplinary, appeal and arbitration proceedings, are likely to be treated as fruitless and wasteful expenditure in respect of which there may be serious consequences for the organisation under the Public Finance Management Act. The consequential loss of public resources is a concern. Importantly the board is obliged in terms of section 51 to take effective and appropriate steps to prevent fruitless and wasteful expenditure.

22. Finally, it is important to point out that the re - instatement decision may have implications for Amatola Water in the cases of Mr Makibinyane and Mrs Klu. They were both dismissed on inter alia allegations of gross dishonesty which also, inter alia, involved the backdating of the full-time shop steward agreement. A CCMA commissioner upheld their dismissals. Both have applied to the Labour Court for review of the CCMA arbitration. They may now seek to rely on the Minister's decision to demonstrate that they have been inconsistently treated. The potential financial implications should they be reinstated would be astronomical. This too could be treated as fruitless and wasteful expenditure.

OTHER MATTERS

23. With regards to a "petition" to the Minister, the Board except for providing the Minister with what it views as outstanding information, has no intention or plans of petitioning the Minister.

24. Through the CEO and the former Board Chairperson, there has been extensive engagements with Provincial and Local Government to expand the AW footprint through offering its services.

25. Invitation to attend the Clarkebury tap opening ceremony was not received by the Board Members. On enquiry by the Board Members at that time, we were advised that we were not invited.

26. The resignation on the day by the Chairperson when we had a scheduled meeting, and the fact that we did not have a Deputy Chairperson, left a serious leadership void. The members present agreed that we needed to nominate someone to be a Board Representative for the purposes of co - ordination until the Minister appoints a Chairperson. The intention was not to challenge the Minister's authority with this appointment, but it was merely a decision geared to see the smooth functioning of the Board.

27. With regard to the WPA Irregular expenditure, the Board has reported the matter and explained the circumstances under which the said expenditure arose, to both National Treasury and the Ministry. The Board further instructed the administration to undertake the necessary processes per the applicable Treasury Regulations. A Report may be provided.

28. We thank the Minister for opportunity to submit this report and we await the Honourable Minister's response.